86-287

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CROWN OIL CORPORATION, GRANEX CORPORATION, U.S.A. and PAN-PACIFIC COMMODITIES,

Appellants,

v.

LAPIDUS POPCORN, INC.,

Appellee.

On Appeal from the Court of Appeal of the State of California After Denial of Review by the Supreme Court of California

JURISDICTIONAL STATEMENT—STATE CIVIL CASE

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QUESTION PRESENTED

Whether the 1978 amendment to California's Cartwright Act, California Business and Professions Code sections 16700 *et seq.*, to the extent it allows antitrust claims by indirect purchasers for price-fixed overcharge damages, is unconstitutional under (1) the Supremacy Clause or (2) the Due Process Clause of the United States Constitution.

DESIGNATION OF CORPORATE RELATIONSHIPS

1. *Crown Oil Corporation*

Crown Oil Corporation, filing this Jurisdictional Statement as appellant in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Crown Oil Corporation has no parent company and does not have ownership interest in any subsidiaries.

2. *Granex Corporation, U.S.A.*

Granex Corporation, U.S.A., filing this Jurisdictional Statement as appellant in this proceeding, states that:

This is its original Designation of Corporate Relationships.

On February 23, 1982, Granex Corporation, U.S.A., then a Delaware corporation, entered into an agreement pursuant to which it merged with Pan-Pacific Commodities, then a California corporation. Pan-Pacific Commodities was the surviving corporation, but the name of the surviving corporation after that merger was changed to and has remained Granex Corporation, U.S.A. which has, at all times since the merger, been a validly existing California corporation.

At present, the parent company of Granex Corporation, U.S.A. is United Coconut Oil Mills, Inc., a Philippine corporation. Granex Corporation, U.S.A. does not have ownership interest in any subsidiaries.

3. *Pan-Pacific Commodities*

Pan-Pacific Commodities, filing this Jurisdictional Statement as appellant in this proceeding, states that:

This is its original Designation of Corporate Relationships.

On February 23, 1982, Pan-Pacific Commodities entered into an agreement pursuant to which it merged with Granex Corporation, U.S.A. Pan-Pacific Commodities was the surviving corporation but survived under the name Granex Corporation, U.S.A. and has, at all times since the merger, been a validly existing California corporation under that name.

Pan-Pacific Commodities no longer has any separate legal status and, accordingly, has no parent company and does not have ownership interest in any subsidiaries.

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On Appeal from the Court of Appeal of the State of California After Denial of Review by the Supreme Court of California

JURISDICTIONAL STATEMENT—STATE CIVIL CASE

INTRODUCTION

Appellants Crown Oil Corporation, Granex Corporation, U.S.A., and Pan-Pacific Commodities (referred to collectively as "appellants") have settled two separate federal antitrust actions relating to their sales of Philippine coconut oil in the United States, one brought by the United States government and a second by a class of all direct purchasers of that Philippine coconut oil. Settlement of this second action, which claimed the full amount of an alleged price-fixed overcharge, resulted in the creation of a fund for distribution among the plaintiff direct purchasers valued in the millions of dollars.

Having defended against and settled not one, but two federal antitrust complaints, appellants believed that the alleged over-

charge issue had finally been put to rest. To the contrary, however, plaintiff here, purportedly on behalf of a class of indirect purchasers, brought suit in California state court to recover damages for that portion of the alleged overcharge plaintiff claims was passed on to the class by the direct purchasers.

A final decision of the California Court of Appeal in this action holds that, despite this Court's decision in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), the California law providing for such indirect purchaser suits is not preempted by federal law and does not violate the Due Process Clause of the United States Constitution. This appeal followed.

OPINIONS BELOW

The order of the California Superior Court overruling appellants' demurrer to the complaint, dated May 9, 1985 (Appendix, pp. 12-14), is unreported. The opinion of the Court of Appeal of the State of California, First Appellate District, Division Two, dated February 14, 1986, denying appellants' petition for review of that order (Appendix, pp. 1-11), is reported at 177 Cal. App. 3d 604, 223 Cal. Rptr. 164. The initial order of the Supreme Court of the State of California denying review, filed May 22, 1986, and its "corrected" order denying review, filed June 2, 1986 (Appendix, pp. 18, 19), are unreported.

JURISDICTION

This appeal challenges the constitutionality of a state statute (California Business and Professions Code section 16750(a), as amended in 1978) which permits indirect purchasers to maintain antitrust causes of action in state court for recovery of alleged price-fixed overcharge damages passed on to them by direct purchasers. Appellants contend that the California statute, as amended, is preempted by the federal antitrust laws and that it violates the Due Process Clause of the Fourteenth Amendment.

The order of the California Superior Court ruling that the California statute is constitutional was filed on May 9, 1985. Appendix, pp. 12-14. The opinion of the California Court of Appeal holding that there is no preemption and no violation of

due process was filed on February 14, 1986. Appendix, pp. 1-11. Its order denying rehearing was filed on March 13, 1986. Appendix, p. 17. The order of the California Supreme Court denying review was filed on May 22, 1986 (Appendix, p. 18), and its "corrected" order denying review (Appendix, p. 19) was filed on June 2, 1986. A Notice of Appeal to this Court was filed with the California Court of Appeal on August 5, 1986. Appendix, pp. 20-21.

This appeal is being docketed in this Court within ninety days of the California Supreme Court's denial of appellants' petition for review. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Clause 2 of Article VI of the Constitution of the United States of America provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California's Cartwright Act, California Business and Professions Code sections 16700, *et seq.*, provided at section 16750(a) prior to its amendment in 1978, as follows:

> Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in

> the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him, and shall be awarded a reasonable attorneys' fee together with the costs of the suit.

The 1978 amendment added the words:

> Such action may be brought by any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant.

STATEMENT UNDER SUPREME COURT RULE 28.4(c)

Since the proceeding draws into question the constitutionality of California Business and Professions Code section 16750(a) (as amended in 1978), and because the Attorney General of the State of California is not a party to this proceeding, it is noted that 28 U.S.C. section 2403(b) may be applicable.

STATEMENT OF THE CASE

1. Background

In 1977, this Court, in *Illinois Brick v. Illinois*, held that indirect purchasers have no claims for price-fixed overcharge damages under federal antitrust law and thus may not maintain treble damage actions under Section 1 of the Sherman Act, 15 U.S.C. § 1. The Court based its decision, in part, on the serious risk of multiple liability that such actions would create and its conclusion that "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed part of it." 431 U.S. at 745-746.

In 1978, the California Legislature amended the Cartwright Act, California's antitrust law (Cal. Bus. & Prof. Code, §§ 16700,

et seq.), to provide that California indirect purchasers could state claims for price-fixed overcharge damages. As the California Supreme Court observed in *Union Carbide Corp. v. Superior Court*, 36 Cal. 3d 15, 20, 201 Cal. Rptr. 580, 679 P.2d 14 (1984), and as was noted in the California Court of Appeal's opinion in this action, the express purpose of the 1978 amendment was to provide that this Court's holding in *Illinois Brick* does not apply in actions under the state antitrust law.[1]

2. This Proceeding

In 1981, following a federal grand jury investigation conducted by the Department of Justice, the United States filed a civil action against appellants, alleging that they had conspired to fix the price of coconut oil.[2] That action was settled and was disposed of by the entry of a consent judgment.

Immediately following the filing of the government action, several private federal class actions also were filed against appellants, asserting claims under the federal antitrust laws on behalf of every person who made direct purchases from appellants during the alleged price-fixed period. Those direct purchaser actions were consolidated as *In Re Coconut Oil Antitrust Litigation*,

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[1] Prior to this amendment, the California Supreme Court consistently had held that the Cartwright Act, in its entirety, was to be construed consistently with the federal antitrust law on which it was based. *Mailand v. Burckle*, 20 Cal. 3d 367, 376, 143 Cal. Rptr. 1, 527 P.2d 1142 (1978); *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 925, 130 Cal. Rptr. 1, 549 P.2d 833 (1976); *Chicago Title Ins. Co. v. Great Western Financial Corp.*, 69 Cal. 2d 305, 315, 70 Cal. Rptr. 849, 444 P.2d 481 (1968).

[2] In 1979, the Philippine government "rationalized" the coconut oil industry, in part by requiring joint marketing at a single price of most Philippine bulk coconut oil sold in the United States and elsewhere worldwide. The Justice Department never claimed that the Philippines could not lawfully so organize its domestic industry. The Justice Department did take the position, however, that certain United States corporations, including the appellants herein, which marketed Philippine coconut oil, were drawn into the Philippine pricing organization in violation of federal antitrust law.

MDL 474 (N.D. Cal. 1981). In due course, the claims of all such direct purchasers were settled, which settlement was approved by the United States District Court for the Northern District of California. An agreed final judgment was entered in *In Re Coconut Oil Antitrust Litigation* on July 1, 1983.

Thereafter. in 1984, appellee Lapidus Popcorn, Inc., an indirect purchaser of coconut oil, brought this action against appellants in California state court under the 1978 amendment to the Cartwright Act. Appellee alleged that at least some portion of the overcharge created by the alleged conspiracy was passed on to California indirect purchasers, and it brought the action on behalf of a class of all California businesses that had purchased coconut oil indirectly from appellants.

3. How The Federal Questions Were Raised

Appellants demurred to the complaint on the ground that the 1978 amendment to the Cartwright Act is unconstitutional because (1) it is preempted by federal law and (2) it violates the Fourteenth Amendment. The Superior Court overruled that demurrer finding that: (a) the United States Congress has not expressed, by unambiguous language, an intention to preempt California's indirect purchaser provision; (b) that provision does not conflict with federal antitrust law; and (c) the indirect purchaser damage provision does not stand as an obstacle to accomplishment of the full purposes and objectives of Section 4 of the Clayton Act (15 U.S.C. § 15). Appendix, pp. 13-14.

Appellants then filed a petition for writ of mandate in the Court of Appeal of the State of California. That petition was denied on June 26, 1985 (Appendix, p. 15), but by order dated August 21, 1985, the California Supreme Court granted appellants' petition for review and transferred the matter back to the Court of Appeal with directions that it be heard on the merits. Appendix, p. 16.

Upon review on the merits, the California Court of Appeal held that the 1978 amendment to the Cartwright Act was not unconstitutional, in that federal law does not preempt the state statute permitting indirect purchaser claims and that such claims do not violate the Due Process Clause of the Fourteenth Amendment. Appendix, pp. 1-11. The California Supreme Court, with three

justices voting for review (Justices Grodin, Lucas and Panelli), declined to hear the case, thus rejecting the precise constitutional positions urged here. Appendix, p. 18. This appeal followed.[3]

THE FEDERAL QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

1. The Validity Of State Indirect Purchaser Antitrust Claims Is At Issue In This Appeal. This Court's Precedent, Policy And Sound Logic Compel The Conclusion That The California Courts Erred In Holding California's Indirect Purchaser Statute Constitutional.

The validity of state laws giving indirect purchasers antitrust claims is unresolved. This appeal presents that issue with precision and clarity and, as the following factors show, it is thus particularly appropriate for plenary disposition:

(a) The California Legislature's express intent in enacting the 1978 amendment was to avoid the application of this Court's holding in *Illinois Brick* to indirect purchasers in California. The

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[3] For purposes of 28 U.S.C. section 1257(2), the ruling below falls within two of four categories of "final" judgments discussed by this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) and *Flynt v. Ohio*, 451 U.S. 619 (1981).

First, it is a "final judgment on the federal issue for purposes of state-court proceedings." *Flynt, supra*, 451 U.S. at 621; and *see Cox Broadcasting Corp., supra*, 420 U.S. at 479. There are no other federal issues involved, and thus "no probability of piecemeal review with respect to federal issues." *Flynt, supra*, 451 U.S. at 621.

Second, "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Cox Broadcasting Corp., supra*, 420 U.S. at 482-483. The additional criterion mentioned in *Flynt* is also met, *i.e.*, the case involves "identifiable federal statutory or constitutional policies which would [be] undermined by the continuation of the litigation in the state courts." *Flynt, supra*, 451 U.S. at 622. As discussed herein, this case involves a direct assault upon the important federal policies recognized in this Court's decision in *Illinois Brick v. Illinois*.

1978 amendment "incorporates into the Cartwright Act the view of the dissenting opinion in *Illinois Brick*." *Union Carbide Corp., supra*, 36 Cal. 3d at 20. Accordingly, the conflict between the state and the federal rule is unambiguous and unqualified.

(b) The factual context in which the legal issue arises likewise presents the competing considerations unambiguously and in classic form: A federal class action on behalf of all direct purchasers of a price-fixed commodity, during the entire term of the conspiracy, claiming the entire amount of the overcharge (trebled); a disposition of the entire claim by settlement; followed by an indirect purchaser action in state court to recover overcharge damages which they claim were passed on to them.

(c) The opinion of the California court squarely attacks and rejects this Court's reasoning and holding in *Illinois Brick*, asserting that it is this Court's decision itself "which frustrates Congress'-purpose in creating the treble-damages action." Appendix, p. 9.

A. California Law Permits Multiple Liability Forbidden By Federal Law.

Federal antitrust law prohibits both multiple liability and *the risk* of multiple liability. *Illinois Brick v. Illinois*, 431 U.S. 720, 730-731 (1977). In *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481 (1968), this Court determined that the passing-on of an alleged price-fixed overcharge to indirect purchasers is no defense to a claim by direct purchasers for the full amount of that overcharge. 392 U.S. at 494. In *Illinois Brick*, this Court went on to state that "[a] one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudication and therefore of unwarranted multiple liability for the defendant." *Illinois Brick, supra*, 431 U.S. at 730.

The prohibition against multiple liability is fundamental to the Court's decision. Observing that the use of procedural devices such as consolidation and statutory interpleader "cannot protect against multiple liability where the direct purchasers have already recovered by obtaining a judgment or by settling, as is more likely (and as occurred here . . .)," this Court declared:

> [P]roponents of this approach ultimately fall back on the argument that it is better for the defendant to pay sixfold or more damages than for the injured party to go uncompensated . . . ('a little slopover on the shoulders of the wrongdoers . . . is acceptable'). *We do not find this risk acceptable.* 431 U.S. at 731, n. 11 (emphasis added).[4]

As the Court of Appeals for the Ninth Circuit has also recognized, indirect purchaser suits such as the one presented here create "the risk that [a] state suit [by indirect purchasers] may result in the 'duplicative recoveries' condemned by the Supreme Court." *Alton Box Bd. Co. v. Esprit De Corp.*, 682 F.2d 1267, 1272 (9th Cir. 1982).

Nonetheless, the California Court of Appeal refused to find that the state law was preempted, and it was completely candid in its reasons for doing so. It held that this Court was plainly wrong, stating that: "[I]t is the *Illinois Brick* majority decision which frustrates Congress' purpose in creating the treble-damages action." Appendix, p. 9.

The California Court of Appeal further asserted that it is the 1978 amendment to the Cartwright Act, and not the decision in *Illinois Brick*, that "comports with Congress' express intent." Appendix, p. 9. Reasoning that the federal suits involving appellants resulted in settlements and that the issue of damages was never adjudicated, the California Court of Appeal claimed that "[t]he potential for multiple liability in the present case is sheer speculation." Appendix, p. 10. But that conception is based upon the erroneous premise that settling defendants should be treated differently from defendants subject to adverse judgments, a proposition specifically rejected by this Court in *Illinois Brick*. *See* 431 U.S. at 731, n. 11.

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[4] The risk in the case at bar is more extreme than the usual circumstance. Indeed, this case fits within one of the situations which even the dissent in *Illinois Brick* recognized as risking multiple recovery: "where suits are independently instituted after an earlier suit based on the same violation has proceeded to judgment." 431 U.S. at 763-764.

The California Court of Appeal concluded by holding that, because in its view *Illinois Brick* was based upon a "judicially economic rationale," and not a correct determination of Congressional intent, it did not constitute "an adequate basis for a preemption argument." Appendix, p. 9. The California court thus set itself above this Court as the supreme arbiter of Congressional intent.[5]

B. California Law Frustrates Enforcement Of The Federal Law.

Although indirect purchaser suits under California law are prosecuted in state, not federal, courts, such indirect purchaser suits nonetheless frustrate the enforcement of federal treble damage actions. Quite apart from the issue of multiple liability, those indirect purchaser suits impede settlement, reduce the amount available to direct purchasers, and reintroduce the complexity of pass-on calculations that *Illinois Brick* prohibited.

Federal law recognizes "the strong judicial policy favoring settlements." *In Re Chicken Antitrust Litigation, Etc.*, 669 F.2d 228, 238 (5th Cir. 1982). However, if indirect purchasers are allowed to assert state antitrust claims, then those claims must be taken into account in settlement of a federal action. Recognizing that defendants rightfully insist upon "total peace" in settlement negotiations, the Fifth Circuit Court of Appeals responded to objections by direct purchasers to the inclusion of indirect purchasers in the allocation of settlement funds, as follows:

> Defendants' insistence upon obtaining a complete release from all significant potential plaintiffs necessarily meant that no settlement would have been reached unless indirect purchasers released their claims against defendants. This, in

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[5] The correctness of this Court's determination of the intent of Congress is further demonstrated by the fact that, in the nine years following *Illinois Brick*, at least eight separate bills have been introduced to change its effect. None has passed. Most recently, on June 5, 1986 a bill to allow suits by indirect purchasers in certain limited instances was defeated in the Senate Judiciary Committee. Bureau of National Affairs, *Corporate Counsel Weekly*, vol. 1, No. 23, p. 1, (June 11, 1986).

> turn, meant that *indirect purchasers had the power to frustrate any settlement* and unless those classes primarily composed of indirect purchasers also received a share of the settlement proceeds, there would have been no settlement. 669 F.2d at 238 (emphasis added).

Thus, the presence of indirect purchaser claims obstructs federal policy encouraging settlement in at least two ways. First, where there exists the possibility that indirect purchaser claims may be made, defendants necessarily must be significantly less motivated to accept a settlement which does not include such claims. Second, it is significantly more difficult to achieve such a settlement where "indirect purchasers ha[ve] the power to frustrate any settlement." *Ibid.*

Moreover, in *Illinois Brick*, this Court held that consideration of indirect purchaser claims would seriously undermine the effectiveness of federal treble damage actions by transforming them into massive administrative efforts to apportion recovery among all potential plaintiffs, adding intolerable complexity to the resolution of such actions. In the words of this Court:

> The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement. 431 U.S. at 745.

Necessarily, the inclusion of indirect purchaser claims in federal settlements will require federal courts to consider pass-on allocations, since "no overall settlement can be adjudged fair or unfair unless the allocation scheme is also examined." *In Re Chicken, supra*, 669 F.2d at 235. Thus, if state indirect purchaser claims are allowed, the federal courts will be burdened in settlement proceedings with consideration of numerous pass-on allocation issues, including pass-ons among indirect purchasers in state court actions. In addition, if direct purchasers are required to share settlement funds with indirect purchasers, the amount of money available to them will be depleted, contrary to the federal policy announced in *Illinois Brick*. *See* 431 U.S. at 746-747.

This Court reviewed all of the relevant factors, in a different context, in *Associated General Contractors, Inc. v. Calif. State*

Council of Carpenters, 459 U.S. 519 (1983). The Court stated that:

> The indirectness of the alleged injury also implicates the strong interest, identified in our prior cases, in keeping the scope of complex antitrust trials within judicially manageable limits. These cases have stressed the importance of avoiding either the risk of duplicative recoveries on the one hand, or the danger of complex apportionment of damages on the other.
>
> We observed that potential plaintiffs at each level in the distribution chain would be in a position to assert conflicting claims to a common fund, the amount of the alleged overcharge, thereby creating the danger of multiple liability for the fund and prejudice to absent plaintiffs. 459 U.S. at 543-544.

C. California Law Violates Due Process By Giving Claims To Indirect Purchasers For Price-Fixed Overcharges.

The risk of multiple liability for a single wrong also violates due process. *See Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 80 (1961) (the risk that Western Union might be forced to pay a single debt of unclaimed money from money orders to more than one state would violate the Due Process Clause of the Fourteenth Amendment).[6] In rejecting indirect purchaser claims under New York's antitrust laws, the court in *Russo & Dubin v. Allied Maintenance Corp.*, 407 N.Y.S.2d 617, 620 (1978), held that the allowance of indirect purchaser suits "would subject defendants to multiple liability in derogation of due process." In *In Re Wiring Devices Antitrust Litigation*, 498 F. Supp. 79, 88 (E.D.N.Y. 1980), the court noted that its holding, that South Carolina's state law did not allow indirect purchaser suits, permitted it to avoid the "serious questions which would otherwise have

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[6] *See also Cities Service Co. v. McGrath*, 342 U.S. 330, 335-36 (1952) (Fifth Amendment protects "against double liability"); *Boutte v. Chevron Oil Co.*, 316 F. Supp. 524, 530 (E.D.La. 1970), *affirmed per curiam*, 442 F.2d 1337 (5th Cir. 1971) (judgment exposing defendant to the risk of paying royalties twice would violate due process).

to be faced under the Supremacy, Due Process and Commerce Clauses of the Federal Constitution." The due process infirmity is squarely presented by the California statute.

2. Resolution Of The Indirect Purchaser Issue Is Of Great Practical Importance To The Administration Of Justice.

As of July 8, 1985, no fewer than thirteen indirect purchaser complaints had been filed in California alone since enactment of the 1978 amendment to the Cartwright Act.[7] Furthermore, each such case is simply one of a number of potential indirect purchaser actions that might be brought against these same appellants in state courts in other jurisdictions based on the same alleged conspiracy. At least nine other states have statutes allowing public or private indirect purchaser suits,[8] and numerous

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[7] *Esprit De Corp. v. Alton Box Bd. Co.*, S.F. Superior Court, No. 750975 (related to Corrugated Container Antitrust Litigation); *Villmar Dental Studio, Inc., et al. v. Union Carbide Corp., et al.*, S.F. Superior Court, No. 776005 (related to Industrial Gas Antitrust Litigation); *B.W.I. Custom Kitchen v. Owens-Illinois, Inc., et al.*, S.F. Superior Court, No. 813271 (Glass Container Industry); *Pate v. Boise Cascade Corp.*, S.F. Superior Court, No. 765742 (related to Fine Paper Antitrust Litigation); *Greenberg v. Leviton Manufacturing Company, Inc.*, S.F. Superior Court, No. 759734 (related to Wiring Devices Antitrust Litigation); *Goldberg v. CPC International, Inc., et al.*, S.F. Superior Court, No. 765217 (related to Corn Derivatives Antitrust Litigation); *State of California v. California Hawaiian Sugar Co., et al.*, and *Brinker v. Amalgamated Sugar Co., et al.*, S.F. Superior Court, *see* 588 F.2d 1270 (9th Cir. 1978) (related to Sugar Antitrust Litigation); *Louie v. Cuisinarts, Inc.*, S.F. Superior Court, No. 881943 and *Gayer v. Cuisinarts, Inc.*, San Diego Superior Court, No. 458970 (related to Cuisinart Food Processor Antitrust Litigation); *Busy Boy Markets, Inc., et al. v. Roblin Industries, Inc.*, Civil Action No. 772-241 (shopping carts); *Retail Clerks Union, Local 648 v. Exxon Corp.*, MDL 150 WPG (gasoline); *Classic Remodeling and Renovation et al. v. Amtel, Inc.*, S.F. Superior Court, No. 786-832 (screws); *Alexander v. Cambridge Lee Industries, Inc.*, S.F. Superior Court, No. 831249 (copper tubing).

[8] Ala. Code § 6-5-60(a) (1975); D.C. Code Ann. § 28-4509 (1981); Haw. Rev. Stat. § 480-14(c) (amended 1980); Ill. Ann. Stat. Ch. 38, § 60-7(2) (amended 1979); Md. Ann. Code § 11-209 (amended 1982);

other states have ambiguous laws which could be interpreted to permit such suits. Thus, there is a substantial potential for a large number of state indirect purchaser actions, all based on the same alleged wrongdoing by the same defendants, all seeking recovery against the same alleged overcharge fund, and all requiring assessment and supervision in any settlement of a federal direct purchaser action.

In the federal system, federal direct purchaser claims filed in different districts in different states can be transferred to one court for joint proceedings under 28 U.S.C. section 1407. Because of the very nature of the independent sovereignties of the states, however, actions in different state courts cannot be joined. Thus, procedural devices to avoid the problems of indirect purchaser claims are even less workable in state indirect purchaser actions than they would be in federal indirect purchaser actions. Moreover, this Court in *Illinois Brick* found "not . . . acceptable" the risk of multiple liability that remained despite the use of available federal procedural devices. 431 U.S. at 731, n. 11.

The importance of the issue presented here is not limited to private civil litigants. Assistant Attorney General Thomas Dove, head of the Antitrust Division in the Department of Justice of the State of California, recently declared:

> It's [the California Court of Appeal's decision in this case] going to be extraordinarily significant . . . We're talking billions of dollars, a billion in California alone. Peninsula Times Tribune, February 19, 1986, p. D-4.

Similarly, the California Attorney General as *Amicus Curiae* stated in a brief filed in state court in this action that:

> The California Attorney General is vitally interested in the issue raised by [appellants'] petition. In addition to being empowered to bring criminal antitrust actions, the California Attorney General may sue for injunction, penalties and damages on behalf of consumers, as well as state and local

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Miss. Code Ann. § 75-21-9 (1972); N.M. Stat. Ann. § 57-1-3(A) (amended 1979); S.D. Codified Laws Ann. § 37-1-33 (amended 1980); Wis. Stat. Ann. § 133.18(1) (amended 1980).

governmental entities hurt directly or indirectly by antitrust violations. Memorandum of the California Attorney General as *Amicus Curiae* in Opposition to Petition for Writ of Mandate, pp. 1-2.

The interests expressed by California's Attorney General are undoubtedly echoed by attorneys general in at least those nine jurisdictions which have indirect purchaser statutes. The same issue will undoubtedly arise in those states, if it has not already arisen. By this appeal, the Court has the opportunity to resolve the preemption issue, not only with respect to existing lawsuits in California, but for all jurisdictions which have antitrust statutes permitting indirect purchasers to maintain actions for price-fixed overcharge damages contrary to the federal law laid down by this Court in *Illinois Brick v. Illinois.*

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should note probable jurisdiction of this appeal and hear plenary argument of the issue presented. In the alternative, review should be granted under 28 U.S.C. section 2103.

Dated: August 19, 1986.

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Appendix

In the Court of Appeal of the State of California
First Appellate District
Division Two
A031735
(San Francisco Super.Ct.No. 829235)

Certified for Publication

Crown Oil Corporation et al.,
Petitioners,
v.
Superior Court of State of California,
for the City and County of San Francisco,
Respondent,
Lapidus Popcorn, Inc.,
Real Party in Interest.

OPINION
[Filed Feb. 14, 1986]

Petitioners Crown Oil Corporation, Granex Corporation, U.S.A., and Pan Pacific Commodities (hereafter defendants) seek review of the trial court's order overruling their demurrer to a complaint filed by real party in interest Lapidus Popcorn, Inc. (hereafter plaintiff) on behalf of a class of indirect purchasers of coconut oil from defendants. Initially, this court denied the petition without opinion, after which the California Supreme Court directed us to issue an alternative writ with respect to the petition.

Plaintiff filed suit against defendants alleging violations of California's Cartwright Antitrust Act (Cartwright Act) and Unfair Practices Act. (Bus. & Prof. Code, §§ 16700 et seq., 17000 et seq.)[1] The action was brought on behalf of a class of California businesses which purchased coconut oil indirectly from defendants. Specifically alleging violations of sections 16720 and 17200,

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[1] All statutory references are to the Business and Professions Code unless otherwise indicated.

the complaint prayed for treble damages in accordance with section 16750, subdivision (a).

Defendants demurred to the complaint on the grounds, inter alia, that the 1978 amendment to the Cartwright Act (Stats. 1978, ch. 536, § 1, p. 1693), to the extent that it authorizes indirect purchasers to sue for treble damages for price-fixing overcharges, is in conflict with and frustrates federal law which prohibits such indirect purchaser recovery. Accordingly, defendants maintained that the amendment is preempted by federal law under the Supremacy Clause. (U. S. Const., art. VI, cl. 2.)[2]

The trial court overruled the demurrer, finding "1. The State law does not conflict with the federal law; [¶] 2. Congress has not expressed, by unambiguous language, an intention to preempt; and [¶] 3. The State law does not stand as an obstacle to the accomplishment of the full purposes and objectives of the Clayton Act." We agree and affirm the order.

I. BACKGROUND

In 1890, the United States Congress enacted the Sherman Act (15 U.S.C. §§ 1-7) which prohibits trade restraints and monopolistic practices that affect interstate and/or foreign commerce.

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[2] In their points and authorities in support of the demurrer, defendants stated that several complaints, alleging the identical wrongdoing, had been filed in federal district courts on behalf of all direct purchasers of coconut oil against the same named defendants. These federal actions, brought pursuant to sections 1 and 2 of the Sherman Antitrust Act (Sherman Act) (15 U.S.C. §§ 1, 2) and sections 4 and 16 of the Clayton Antitrust Act (Clayton Act) (15 U.S.C. §§ 15, 26), were subsequently consolidated and transferred to the United States District Court for the Northern District of California. (*In re Coconut Oil Antitrust Litigation MDL 474.*) On July 1, 1983, an agreed final judgment was entered in the federal action in accordance with a settlement agreement. The settlement terms included an agreement by defendants to pay the plaintiffs $2 million in cash and to distribute to the plaintiffs class coupons evidencing credits for 40,241,448 pounds of crude and refined coconut oil which were valued for settlement purposes at $10 million.

Thereafter, in 1914, Congress passed section 4 of the Clayton Act (15 U.S.C. § 15) and created a private right of action for persons injured by antitrust violations. The California Legislature codified this state's common law against trade restraints by enacting the Cartwright Act in 1941. (§ 16700 et seq.) The Cartwright Act provided a private right of action to any person "injured in his business or property." Thus, for more than 40 years both federal and state law have provided protection for persons injured by antitrust violations.

In 1968, the United States Supreme Court was called upon to resolve a conflict in the United States circuit courts as to whether an antitrust defendant could raise a "pass-on" defense. In *Hanover Shoe v. United Shoe Mach.* (1968) 392 U.S. 481, the plaintiff, a shoe manufacturer, sued the defendant shoe machinery manufacturer, claiming that the defendant's practice of leasing rather than selling its machinery had monopolized the shoe machinery industry in violation of section 2 of the Sherman Act. The plaintiff alleged injury to his business resulting from the leasing practice, because its costs were higher than they would have been if the defendant had been willing to sell the machinery outright. The defendant asserted a "pass-on" defense, alleging that the plaintiff was not injured by the overcharge because it was passed on to its customers further down the chain of distribution in the form of higher prices.

The Supreme Court rejected this defense and held that "when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4." (*Hanover Shoe v. United Shoe Mach., supra,* 392 U.S. 481, 489.) The court reasoned that there would be insurmountable difficulties in tracing the overcharge through the chain of distribution and the ultimate consumers would have little interest in bringing a class action because of the insignificant monetary injuries they sustained. The court concluded that if direct purchasers were not allowed to sue for the portion of the overcharge passed on to indirect purchasers, antitrust violators would profit by their illegal acts since nobody would bring suit against them. (*Id.,* at pp. 492-494.) Although

Hanover Shoe prohibited the defensive use of the "pass-on" doctrine, it left unanswered the question of whether the "pass-on" theory could be used offensively by indirect consumers.

This question was answered in the negative in *Illinois Brick Co. v. Illinois* (1977) 431 U.S. 720. The plaintiffs in *Illinois Brick*, the State of Illinois and 700 local governmental entities, filed suit against the defendant concrete block manufacturers, charging a price-fixing conspiracy in violation of section 1 of the Sherman Act. The defendants allegedly fixed the price of concrete blocks which they sold to masonry contractors. The masonry contractors, acting as subcontractors for the masonry portions of construction projects, in turn sold to general contractors. The general contractors finally sold the buildings to the plaintiffs. The defendants moved for partial summary judgment against all of the plaintiffs that were indirect purchasers of concrete block, contending that as a matter of law only direct purchasers could sue for the alleged overcharge.

The Supreme Court agreed. Seeking symmetry with its holding in *Hanover Shoe*, the court stated that "whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants." (*Illinois Brick Co. v. Illinois, supra*, 431 U.S. 720, 728.) The court stated two reasons for its decision. First, allowing offensive but not defensive use of the "pass-on" doctrine would create a substantial risk of multiple liability for defendants. (*Id.*, at p. 730.) Second, "the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution." (*Id.*, at p. 732.)

In California, reaction to the *Illinois Brick* decision was immediate. In 1978, the California Legislature added the following paragraph to section 16750, subdivision (a): "Such action may be brought by any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, *regardless of whether such injured person dealt directly*

or indirectly with the defendant." (Emphasis added.)[3] As the California Supreme Court subsequently observed, "California's 1978 amendment to section 16750 in effect incorporates into the Cartwright Act the view of the dissenting opinion in *Illinois Brick*[4] [citation] that indirect purchasers are persons 'injured' by illegal overcharges passed on to them in the chain of distribution." (*Union Carbide Corp. v. Superior Court* (1984) 36 Cal.3d 15, 20.)

It is against this backdrop that we consider defendants' contention that the 1978 amendment to the Cartwright Act is preempted by federal law.

II. PREEMPTION

"It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms. [Citation.] Absent explicit pre-emptive language, Congress' in-

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[3] A similar response occurred in other jurisdictions. (See, e.g., Hawaii Rev. Stats., § 480-14(c); Ill. Ann. Stats., ch. 38, § 60-7(2); N.M. Stats. Ann., § 57-1-3(a); Wis. Stats. Ann., § 133.18(1); D.C. Code Ann., § 28-45091; Md. Code Ann., § 11-209; S.D. Laws Ann., § 7-1-33.) Alabama and Mississippi already had statutes allowing indirect-purchaser recovery. (See Ala. Code, § 6-5-60(a); Miss. Code Ann., § 75-21-9.)

[4] The dissent viewed the majority opinion as a regrettable retreat from prior cases which extended recovery to all persons who are made victims of the forbidden practice. (See *Mandeville Farms v. Sugar Co.* (1948) 334 U.S. 219, 236.) Justice Brennan declared that the decision frustrated Congress' plainly stated objective to provide a remedy to all persons injured by violations of the antitrust laws. The dissent draws attention to the then recently enacted Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 15c et seq.) which gave state Attorneys General a cause of action to sue as *parens patraie* on behalf of citizens against antitrust violators and reasoned that the act confirmed Congress' intent to provide redress to all injured persons. (*Illinois Brick Co. v. Illinois, supra*, 431 U. S. 720, 748-765.) In a separate dissenting opinion, Justice Blackmun stated that had *Hanover Shoe* not been " 'on the books,' " he was positive that possibly a unanimous court would have ruled in favor of the plaintiffs. (*Id.*, at p. 765.)

tent to supersede state law altogether may be found from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," . . . ' [Citations.] Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' [citation], or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citation.]" (*Pacific Gas & Elec. v. Energy Resources Comm'n* (1983) 461 U.S. 190, 203-204; see also *Silkwood v. Kerr-McGee Corp.* (1984) ___ U.S. ___ [___ L.Ed.2d ___, 104 S.Ct. 615, 621].)

Defendants concede that Congress has not completely displaced state regulation in the area of antitrust. (See *R. E. Spriggs Co. v. Adolph Coors Co.* (1974) 37 Cal.App.3d 653, 660.) However, they contend that a specific provision of state law may nonetheless by preempted where, as here, it stands in square opposition to the federal rule that indirect purchasers may not claim price-fixed overcharges.

Defendants' first and strongest argument in favor of preemption is that California law permits multiple liability. They reason that damages caused by antitrust violations result in a "single overcharge" which is placed in a "common fund." (See *Blue Shield of Virginia v. McCready* (1982) 457 U.S. 465, 474; *Illinois Brick Co. v. Illinois, supra,* 431 U.S. 720, 737.) They claim that if recovery from the common fund is limited to direct purchasers under federal law, a second fund for indirect consumers created by state law creates the risk of duplicative recoveries, a practice frowned upon by the *Illinois Brick* court. (*Id.,* at p. 731, fn. 11.) While this court, like the United States Supreme Court, is troubled by the threat of multiple liability, we find defendants' agrument unpersuasive with respect to the issue of preemption.

Preliminarily, we note that where, as in the case of antitrust regulation, Congress has not expressed its intent to preempt state authority, the proper approach to a preemption analysis is to reconcile "the operation of both statutory schemes with one

another rather than holding one completely ousted." (*Silver v. New York Stock Exchange* (1963) 373 U.S. 341, 357; see also *Merrill Lynch, Pierce, Fenner & Smith v. Ware* (1973) 414 U.S. 117, 127.)

In the present case there is no conflict between the federal and state statutes concerning conduct. "Both the Sherman Act and the Cartwright Act proscribe price fixing—the standard for lawful competitive conduct is identical under both state and federal law." (*Alton Box Bd. Co. v. Esprit de Corp.* (9th Cir. 1982) 682 F.2d 1267, 1274, fn. 11.) In addition, there is no discrepancy between the federal and state schemes with regard to certain remedies. The *Illinois Brick* court left open the possibility of recovery for some indirect consumers where direct purchasers used a "cost-plus" pricing schedule or were owned or controlled by the its customer. (*Illinios Brick Co. v. Illinios, supra,* 431 U.S. 720, 735-736 & fn. 16.) Also, federal case law has held that indirect purchasers may obtain injunctive relief pursuant to section 16 of the Clayton Act even if monetary relief is generally unavailable. (*In re Beef Industry Antitrust Litigation* (5th Cir. 1979) 600 F.2d 1148, 1167; *Mid-West Paper Products Co. v. Continental Group* (3d Cir. 1979) 596 F.2d 573, 589-594.) Thus, a potential conflict arises only when we compare federal and state remedies with respect to damages.

It has long been established that " ' the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each.' " (*California v. Zook* (1949) 336 U.S. 725, 731, citing *United States v. Marigold* (1850) 50 U.S. 559, 569.) The United States Supreme Court has recently confirmed the same principle.

In *Silkwood v. Kerr-McGee Corp., supra* ___ U.S. ___ [___ L.Ed.2d ___, 104 S.Ct. 615], the United States Supreme Court rejected the argument that the Nuclear Regulatory Commission's (NRC) exclusive authority to regulate nuclear safety and provide penalties preempted state punitive recovery under state tort law. "The United States, as amicus curiae, contends that the award of punitive damages in this case is preempted because it conflicts

with the federal remedial scheme, noting that the NRC is authorized to impose civil penalties on licensees when federal standards have been violated. 42 U.S.C. § 2282 (1976 ed. and Supp. V.). However, the award of punitive damages in the present case does not conflict with that scheme. Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme." (*Id.*, at p. 626.)

Similarly, in *Hayfield Northern R. v. Chicago & N.W. Transp.* (1984) ___ U.S. ___ [___ L.Ed.2d ___, 104 S.Ct. 2610], the high court upheld a Minnesota condemnation statute which purportedly was preempted by the Staggers Rail Act of 1980. (49 U.S.C. § 10903-10906.) In response to the argument that the state statute allowed shippers to relitigate that price the Interstate Commerce Commission had established for the purchase or subsidizing of railroad lines, the court stated that "although it may seem unfair to allow a shipper a 'second bite at the apple' in state condemnation proceedings after it has participated in . . . negotiations under [federal statute], that second opportunity does not frustrate the purpose of the federal valuation scheme." (*Id.*, at p. 2619.)

In the present situation we see no way that California's remedy for antitrust violations conflicts with the federal remedy. The fact that the injured indirect purchasers may recover under state law does not obstruct the federal scheme which only permits recovery by direct purchasers.[5] As the California Supreme Court has stated, "Questions of whether overcharges were passed on, essential to the indirect purchaser's California claim, are irrelevant to, and thus not subject to inconsistent determination in, a suit on the direct purchaser's federal claim." (*Union Carbide Corp. v. Superior Court, supra,* 36 Cal. 3d 15, 23.) Thus, it cannot be asserted

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[5] If, for example, the state statute required that all overcharges be paid to indirect consumers, but not direct consumers, there would be a conflict with the federal remedy. However, in the present case, the California statute in no way impinges on recovery of damages by direct purchasers.

that section 16750 either conflicts with federal law or stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The statute comports with Congress' express intent to provide a remedy to "*any* person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." (See 15 U.S.C. § 15.) Indeed, we agree, as did our state's Legislature, with Justice Brennan's observation that it is the *Illinois Brick* majority decision which frustrates Congress' purpose in creating the treble-damages action. (*Illinois Brick Co. v. Illinois, supra,* 431 U.S. 720, 754-756.) In any event, we do not view the judicially economic rationale set forth in *Hanover Shoe* and *Illinois Brick* as constituting an adequate basis for a preemption argument.[6]

III. DUE PROCESS

Relying on *Western Union Co. v. Pennsylvania* (1961) 368 U.S. 71, *Cities Service Co. v. McGrath* (1952) 342 U.S. 330, and *Boutte v. Chevron Oil Company* (E.D.La. 1970) 316 F.Supp. 524, defendants also contend that section 16750, by giving claims to indirect purchasers for price-fixed overcharges, violates due process.[7] The contention rests on the assumption that antitrust

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[6] A similar conclusion was reached in *State Indirect Purchaser Statutes: The Preemptive Power of Illinois Brick* (1982) 62 Boston University Law Review 1241. That note sets forth an excellent analysis of whether state statutes that authorize indirect purchaser suits so conflict with the federal policies expressed in *Illinois Brick* as to require preemption of the state statutes. The author reasons that since the legislative history of the federal antitrust law, and the case law thereunder, do not evidence a *congressional* intent to displace state law and since the *Illinois Brick* decision is based predominantly on the policy of judicial economy, the Supreme Court's reliance on nonstatutory policies dictates that the decision not be extended to displace state laws that allow such suits.

[7] Defendants also cite *Russo & Dubin v. Allied Maintenance Corp.* (1978) 407 N.Y.S.2d 617, and *In re Wiring Device Antitrust Litigation* (E.D.N.Y. 1980) 498 F.Supp. 79. However, in both of these antitrust actions no state statute provided for suits by indirect purchasers and the due process argument was never fully discussed.

overcharges and penalties result in one common fund; if that common fund is distributed to direct purchasers in federal actions, a subsequent award to indirect consumers in state actions raises the specter of double recovery.

We need not here discuss the possibility that there may be both a federal common fund and a state common fund, or whether a federal award may be used to offset a state award. The potential for multiple liability in the present case is sheer speculation.

First, as both the *Illinois Brick* court and our own Supreme Court have pointed out, " 'there is a greater *hypothetical* danger of multiple recovery where suits are independently instituted after an earlier suit based on the same violation has proceeded to judgment.' " (*Union Carbide Corp. v. Superior Court, supra,* 36 Cal.3d 15, 24, quoting *Illinois Brick Co. v. Illinois, supra,* 431 U.S. 720, 763; emphasis added.) In this case, although an agreed final judgment was entered pursuant to a settlement agreement,[8] no liability under the Sherman Act was admitted and, certainly, the issue of damages was never adjudicated. Thus, there is no indication of the actual damages in the federal action, which would form the basis for a charge of multiple liability.

Second, there is nothing to show at this pleading stage of the proceedings that a duplicative recovery will occur. We are merely called upon to review whether plaintiff has stated a cause of action. It is not the function of this court to give advisory opinions on how to avoid a potential multiple recovery. We, as others, are confident that when the threat of double recovery occurs, the trial court will fashion relief accordingly. (See *Illinois Brick Co. v. Illinois, supra,* 431 U.S. 720, 761-762.)

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[8] See footnote 2, ante.

The trial court's order overruling defendants' demurrer is affirmed and the alternative writ is discharged.

CERTIFIED FOR PUBLICATION.

Rouse, J.

WE CONCUR:

Kline, P.J.

Smith, J.

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In the Superior Court
of the
State of California, in and for the
City and County of San Francisco

No. 829235

Lapidus Popcorn, Inc.,
Plaintiff,

vs.

Crown Oil Corporation; Granex Corporation, U.S.A.;
Pan Pacific Commodities, and Does I through XXX,
Defendants.

ORDER OVERRULING DEFENDANTS' DEMURRER TO PLAINTIFF'S COMPLAINT

[Filed May 9, 1985]

Defendants *Crown Oil Corporation, Granex Corporation, U.S.A.* and *Pan Pacific Commodities* demurred to plaintiff Lapidus Popcorn Inc.'s complaint on the ground that the provision of California's Cartwright Act, Business and Professions Code, Section 16750, which permits treble damage actions by indirect purchasers, is preempted by federal law as set out in the United States Supreme Court's Ruling in *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 Ld.2d 707 (1977), *rehearing denied,* 434 U.S. 881, 98 S.Ct. 243 (October 3, 1977) and elsewhere.

The defendants have settled a Sherman Act price fixing overcharge case with a Federal class of direct purchasers, MDL 474. This suit seeks price fixing overcharge damages under the Cartwright Act on behalf of California business indirect purchasers who purchased from direct purchasers encompassed within the MDL 474 Federal class.

The hearing on Defendants' demurrer came on regularly before this Court in Department 8 on April 4, 1985, the Honorable Roy L. Wonder presiding. Plaintiff appeared by Francis O. Scarpulla of Scarpulla & Scarpulla, the Attorney General of the State of California as *Amicus Curiae* appeared by Patricia A. Cutler, defendant Crown Oil Corporation appeared by James F. Kirkham of Pillsbury, Madison & Sutro and defendants Granex Corporation, U.S.A. and Pan Pacific Commodities appeared by Jonathan S. Kitchen of Baker & McKenzie.

Having considered the moving and opposition papers, the arguments of counsel, and the records and files herein, it is hereby ordered that:

1. Defendants' demurrer is overruled;

2. The United States Congress has not expressed, by unambiguous language, an intention to preempt the California Cartwright Act's indirect-purchaser damage provision;

3. The California Cartwright Act's indirect-purchaser, damage provision does not conflict with federal antitrust law; and

4. The California Cartwright Act's indirect-purchaser damage provision does not stand as an obstacle to the accomplishment of the full purposes and objectives of Section 4 of the Clayton Act.

Dated: May 9, 1985.

ROY L. WONDER
Judge of the Superior Court

Approved as to form:

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Court of Appeal of the State of California
in and for the
First Appellate District
Division: 2

Crown Oil Corp., et al.

vs.

Superior Court, City & County of S.F.
Lapidus Popcorn, Inc.
A031735
San Francisco County No. 829235

[Filed June 26, 1985]

By the Court:

The petition for writ of mandate is denied.

Dated: June 26, 1985

KLINE, P.J.

Order Granting Review
After Judgment by the Court of Appeal
First District, Division Two, No. AO31735

In the Supreme Court of the State of California

In Bank

Crown Oil Corporation et al.,
Petitioners,

v.

Superior Court of the City and County
of San Francisco et al.,
Respondent;
Lapidus Popcorn, Inc., Real Party in Interest

[Filed Aug. 21, 1985]

Petition for review GRANTED. The matter is transferred to the Court of Appeal, First Appellate District, Division Two, with directions to issue an alternative writ to be heard before that court when the proceeding is ordered on calendar.

Chief Justice

KAUS
Associate Justice

GRODIN
Associate Justice

LUCAS
Associate Justice

BROUSSARD
Associate Justice

Associate Justice

Associate Justice

Court of Appeal of the State of California
in and for the
First Appellate District

Division Two

No. A031735

Superior Court No. 829235

Crown Oil Corporation, et al.,
Petitioners,

vs.

Superior Court of the State of
California, in and for the City
and County of San Francisco,
Respondent,
Lapidus Popcorn, Inc.,
Real Party in Interest.

[Filed March 13, 1986]

By the Court:

The petition for rehearing is denied.

Dated March 13, 1986

KLINE, P.J.

Order Denying Review
After Judgment by the Court of Appeal
1st District, Division 2, No. A031735
In the Supreme Court of the State of California
In Bank

Crown Oil Corporation et al., Petitioners,

v.

Superior Court of the City and County
of San Francisco, Respondent;
Lapidus Popcorn, Inc., Real Party in Interest.

[Filed May 22, 1986]

Petition for review of petitioners GRANEX CORPORATION, U.S.A. and PAN PACIFIC COMMODITIES DENIED.

Grodin, J., Lucas, J. and Panelli, J., are of the opinion the petition should be granted.

BIRD
Chief Justice

No. 1/2 A031735

In the Supreme Court of the State of California

In Bank

Crown Oil Corporation et al., Petitioners,

v.

Superior Court of the City and County of San Francisco, Respondent;
Lapidus Popcorn, Inc., Real Party in Interest

[Filed June 2, 1986]

Due to clerical error, the order of this court, filed May 22, 1986, in the above-entitled matter, insofar as it reads "Petition for review of petitioners Granex Corporation, U.S.A. and Pan Pacific Commodities DENIED." is hereby amended to read "Petition for review DENIED."

/s/ BIRD
Chief Justice

In the Court of Appeal of the
State of California
For the First Appellate District

No. A031735

Crown Oil Corporation, Granex Corporation, U.S.A.
and Pan-Pacific Commodities,
Appellants,

v.

Superior Court of the City and
County of San Francisco,
Appellee;
Lapidus Popcorn, Inc.,
Real Party in Interest

[Filed Aug. 5, 1986]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Crown Oil Corporation, Granex Corporation, U.S.A. and Pan-Pacific Commodities, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the California Court of Appeal affirming the trial court's overruling of their demurrer to the Complaint filed by the Real Party in Interest, entered in this action on February 14, 1986, following the California Supreme Court's order denying appellants' petition for review, entered in this action on May 22, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: August 4, 1986.

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Dated: August 4, 1986.

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